

CHAPTER VI

PENALTIES

A. General Policy.

The penalty structure provided under KRS Chapter 338.991 is designed primarily to provide an incentive toward correcting violations voluntarily, not only to the offending employer but more especially, to other employers who may be guilty of the same infractions of the standards or regulations.

1. KY OSH has always taken the position that penalties are neither designed as punishment for violations nor as a source of income for the Agency. Still, Kentucky's General Assembly has made clear its intent that penalty amounts should be sufficient to serve as an effective deterrent to violations.
2. Large proposed penalties, as the Legislature has clearly recognized, serve the public purpose intended under the Law, consequently criteria guiding approval of such penalties by the Secretary are based on meeting this public purpose. (See B.9.d. "Gravity Calculations for Combined or Grouped Violations" and OSHA Instruction CPL 02-00-080 Handling of Cases To Be Proposed for Violation-By-Violation Penalties, 10/21/1990 (Formerly CPL 2.80.)

B. Civil Penalties.

1. Type of Violation as a Factor.

In proposing civil penalties for violations, a distinction is made between serious violations and other violations. There is no statutory requirement that a penalty be proposed when the violation is not serious, but a penalty must be proposed when the violation is serious.

- a. The maximum penalty that may be proposed for a serious or an other-than-serious violation is \$7000.
- b. In the case of willful or repeated violations, a civil penalty of up to \$70,000 may be proposed, but the penalty may not be less than \$5000 for a willful violation.
- c. Penalties for failure to correct a violation may be up to \$7000 for each calendar day the violation continues beyond the final abatement date for a maximum of 30 days.

2. Statutory Authority.

KRS Chapter 338.991 provides the Secretary with the statutory authority to assess civil penalties for violations of the Law.

- a. KRS Chapter 338.991(2) provides that any employer who has received a citation for alleged violation of the Law which is determined to be of a serious nature shall be assessed a civil penalty of up to \$7000 for each violation. (See OSHA Instruction CPL 02-00-051, Enforcement Exemptions and Limitations under the Appropriations Act, 05/28/1998 {Formerly CPL 2-0.51J} for current Congressional exemptions and limitations placed on penalties by the Appropriations Act.)
- b. KRS Chapter 338.991(3) provides that, when the violation is specifically determined not to be of a serious nature, a proposed civil penalty of up to \$7000 may be assessed for each violation.

3. Minimum Penalties.

The following guidelines apply:

- a. The proposed penalty for any willful violation shall not be less than \$5000. This is statutory minimum and not subject to administrative discretion.
- b. No adjusted proposed penalty for a serious violation (citation item) shall be less than \$500.
- c. When the adjusted proposed penalty for an other-than-serious violation (citation item) would amount to less than \$100, no penalty shall be proposed for that violation.
- d. The proposed penalty for any violation(s) that contributed to the cause of a fatal accident shall receive the maximum penalty for its classification with no reductions for size, good faith, or history.

4. Penalty Factors.

Penalties shall be assessed on the basis of four factors:

- a. The gravity of the violation,
- b. The size of the business,
- c. The good faith of the employer, and
- d. The employer's history of previous violations.

5. Gravity of Violation.

The gravity of the violation is the primary consideration in determining penalty amounts. It shall be the basis for calculating the basic penalty for both serious and other violations.

- a. To determine the gravity of a violation the following two (2) assessments shall be made:
 - (1) The severity of the injury or illness which could result from the alleged violation.
 - (2) The probability that an injury or illness could occur as a result of the alleged violation.
- b. The size of the business, the good faith of the employer and the history of previous violations shall be taken into account in deciding the extent to which the gravity-based penalty shall be reduced.

6. Severity Assessment.

The classification of the alleged violations as serious or other-than-serious, in accordance with the instructions in Chapter IV, is based on the severity of the injury or illness that could result from the violation. This classification constitutes the first step in determining the gravity of the violation. The type of injury or illness which could reasonably be expected to result from an employee's exposure to the safety or health hazard cited shall be assigned a severity assessment with the following factors:

- a. High Severity.
Death from injury or illness, injuries involving permanent disability, or chronic, irreversible illnesses.
- b. Medium Severity.
Injuries or temporary, reversible illnesses resulting in hospitalization or a variable but limited period of disability.
- c. Low Severity.
Injuries or temporary, reversible illnesses not resulting in hospitalization and requiring only minor supportive treatment.
- d. Minimal Severity.
Other-than-serious violations. Although such violations reflect conditions which have a direct and immediate relationship to the safety and health of employees, the injury or illness most likely to result would probably not cause death or serious physical harm.

7. Probability Assessment.

The probability that an injury or illness will result from a hazard has no role in determining the classification of a violation but does affect the amount of the penalty to be proposed.

a. Categorization.

Probability shall be categorized either as greater or as lesser probability.

- (1) Greater probability results when the likelihood that an injury or illness will occur is judged to be relatively high.
- (2) Lesser probability results when the likelihood that an injury or illness will occur is judged to be relatively low.

b. Determination.

The CSHO, using professional judgement, shall identify and evaluate as far as possible all of the factors influencing the likelihood of the occurrence of an injury or illness.

c. Safety Violations.

The following circumstances shall normally be considered (and documented in the case file) when violations likely to result in injury are involved:

- (1) Number of workers exposed to the hazardous conditions, both at the same time and sequentially.
- (2) Frequency of exposure, including one-time, short exposures through more frequent exposures from once a week up to exposures of more than once a week up to continuous daily exposure.
- (3) Employee proximity to the hazardous conditions likely to lead to an accident, anywhere from the fringe of danger zone up to the point of danger. Use of PPE such as welding hoods, insulated gloves, safety glasses, hard hats, steel-toed shoes, etc.
- (4) Working conditions including environmental and other factors (e.g., speed of operations, lighting, temperature, weather conditions, noise, housekeeping, etc.) which may cause employee stress and thereby increase the likelihood of an accident.

d. Health Violations.

The following circumstances shall normally be considered (and documented in the case file) when violations likely to result in illness are involved:

- (1) Number of workers exposed to the hazardous conditions, both at the same time and sequentially.
- (2) Duration of employee overexposure to hazardous level of contaminants or other illness producing conditions, ranging from relatively short exposures of less than one hour to continuous daily exposures.
- (3) Use of appropriate personal protective equipment (PPE) where such equipment is utilized by all exposed employees and the employer has an effective PPE program in effect, or where it is not utilized by any of the exposed employees and the employer has no program.
- (4) Medical surveillance program is in place as appropriate and it effectively protects the employees, a defective program which only partially and inadequately protects them, or no medical surveillance program is in effect.

e. Other Factors.

There are other factors which may affect significantly the probability that the hazard will produce an injury or illness and they shall also be considered (and documented):

- (1) Mitigating circumstances, such as specific safety or health instructions, effective training program, a comprehensive safety and health program, evidence of correction underway, warning signs and labels or special procedures, or mandatory administrative controls providing some, though not complete protection, shall be documented and considered in the final evaluation of probability.
- (2) Similarly, contributing circumstances, such as inappropriate or inadequate safety or health instructions, inadequate or lack of training, a poor or non-existent safety and health program, or widespread hazardous conditions or faulty equipment with little or no attempt to control them, shall be documented and considered in the final evaluation of probability.

f. Final Probability Assessment.

All of the factors outlined above shall be considered together in arriving at a final probability assessment.

- (1) A factor shall not materially affect the final probability assessment if, based on the professional judgment of the CSHO as documented in the case file, it:

- (a) Does not significantly influence the probability of an injury or illness causing condition, or
- (b) Would tend to dilute the penalty excessively.

EXAMPLE: In a particularly dangerous trenching situation or in a confined space where there is insufficient oxygen to support life, even when only one or two employees are exposed, it may be appropriate to reduce the weight that might otherwise be given to the number of employees exposed.

- (2) When strict adherence to the probability assessment procedures would result in an unreasonably high or low gravity (See B.5.), the CSHO shall use professional judgment to adjust the probability appropriately. Such decisions shall be adequately documented in the case file.

8. Gravity-Based Penalty.

The gravity-based penalty (GBP) is an unadjusted penalty and is calculated in accordance with the following procedures:

- a. The GBP for each violation shall be determined based on an appropriate and balanced professional judgment combining the severity assessment and the final probability assessment.
- b. For serious violations, the GBP shall be assigned on the basis of the following scale:

SEVERITY	PROBABILITY	GBP	GRAVITY
High	Greater	\$7000	High
Medium	Greater	\$6000	Moderate
Low	Greater	\$5000	Moderate
High	Lesser	\$5000	Moderate
Medium	Lesser	\$4000	Moderate
Low	Lesser	\$3000	Low

- c. The highest gravity classification (high severity and greater probability) shall normally be reserved for the most serious violated conditions, such as those situations involving danger of death or extremely serious injury.
- d. The gravity of a violation is defined by the GBP.
 - (1) A **high gravity** violation is one with a GBP of \$7000.
 - (2) A **moderate gravity** violation is one with a GBP of \$4000 to \$6000.
 - (3) A **low gravity** violation is one with a GBP of \$3000 or less.

- e. A severity assessment of minimal will be used for other-than-serious safety and health violations.
 - (1) Other-than-serious safety and health violations judged to be greater probability shall be assigned a GBP of \$2,000 to which appropriate adjustment factors shall be applied. (See B.10. "Penalty Adjustment Factors")
 - (2) Other-than-serious safety and health violations judged to be of lesser probability shall be cited with no penalty.
 - (3) The Secretary may authorize a penalty between \$1000 and \$7000 for an other-than-serious violation when it is determined to be appropriate to achieve the necessary deterrent effect. The reasons for such a determination shall be documented in the case file.
- f. Penalties to be proposed for other-than-serious regulatory violations are discussed at B.16 "Violation of 29 CFR 1904, 803 KAR 2:060, 803 KAR 2:125 and 803 KAR 2:180 Regulatory Requirements".
- g. A GBP may be assigned in some cases without using the severity and the probability assessment procedures outlined in B.6."Severity Assessment" and B.7,"Probability Assessment," when these procedures cannot appropriately be used.
- h. The Penalty Table (Table VI-1) shall be used for determining appropriate adjusted penalties for serious and other-than-serious violations.

9. Gravity Calculations for Combined or Grouped Violations.

The following procedures apply to the calculations of penalties for combined and grouped violations:

- a. The severity and the probability assessments for combined violations shall be based on the instances with the highest gravity. It is not necessary to complete the penalty calculations for each instance or each sub-item of a combined or grouped violation if it is clear which instance will have the highest gravity.
- b. For grouped violations, the following special guidelines shall be adhered to:
 - (1) Severity Assessment.
There are two considerations to be kept in mind in calculating the severity of grouped violations:

- (a) The severity assigned to the grouped violation shall be no less than the severity of the most serious reasonably predictable injury and illness that could result from the violation of any single item.
- (b) If a more serious injury or illness is reasonably predictable from the grouped items than from any single violation item, the more serious injury or illness shall serve as the basis for the calculation of the severity factor of the grouped violation.

(2) Probability Assessment.

There are three considerations to be kept in mind in calculating the probability of grouped violations:

- (a) The probability assigned to the grouped violation shall be no less than the probability of the item which is most likely to result in an injury or illness.
- (b) If the overall probability of injury or illness is greater with the grouped violation than with any single violation item, the greater probability of injury or illness shall serve as the basis for the calculation of the probability assessment of the grouped violation.
- (c) Some individual probability factors may be increased by grouping and others may not. The increased values shall be used in the probability calculation if, in the professional judgment of the CSHO, a more appropriate probability assessment will result. For example, the number of employees exposed may be increased while the proximity factor may not.

(3) Gravity-Based Penalty.

A single severity assessment and a single probability assessment for the combined or grouped violation will result from the foregoing considerations. That result shall be the basis for determining an appropriate GBP for the violation item according to the guidelines in B.8 "Gravity-Based Penalty."

- c. Combined and grouped violations shall normally be considered as one violation for penalty purposes, and in such cases the guidelines for calculating penalties given in B.6 "Severity Assessment" shall apply.
- d. In egregious cases, i.e., willful, repeated and high gravity serious citations and failures to abate, an additional factor of up to the number of violation instances (number of days since the abatement date for failure to abate) may be applied to the gravity-based penalty calculated in accordance with

B.8, "Gravity-Based Penalty" or the regulatory penalty assigned in accordance with B.16, "Violation of 29 CFR 1904, 803 KAR 2:060, 803 KAR 2:125 and 803 KAR 2:180 Regulatory Requirements" and adjusted in accordance with B.10, "Penalty Adjustment Factors" as described in each of the subsections. Such cases shall be handled in accordance with OSHA Instruction CPL 02-00-080 Handling of Cases To Be Proposed for Violation-By-Violation Penalties 10/21/1990 (Formerly CPL 2.80). Penalties calculated with this additional factor shall not be proposed without the concurrence of the General Counsel and Secretary.

10. Penalty Adjustment Factors.

The GBP may be reduced by as much as **85-percent** depending upon the employer's "good faith," "size of business," and "history of previous violations." Up to **50-percent** reduction is permitted for size, up to **25-percent** reduction for good faith, and up to **10-percent** reduction for history. The 10 percent history adjustment factor may be increased, decreased or not affected. Maximum penalty reductions are to be maintained based on the gravity and/or classification of each violation as outlined in this section

- a. Since these adjustment factors are based on the general character of a business and its safety and health performance, the factors generally shall be calculated only once for each employer. After the classification and probability ratings have been determined for each violation, the adjustment factors shall be applied subject to the limitations indicated in the following paragraphs.
- b. Penalties assessed for each violation classified as **high severity and greater probability** shall be adjusted only for size and history.
- c. Penalties assessed for violations that are classified as **repeated** shall be adjusted only for size and history.
- d. Penalties assessed for violations classified as **willful** shall be adjusted only for size and history.

NOTE: If one violation is classified as willful, no reduction for good faith can be applied to any of the violations found during the same inspection. The employer cannot be willfully in violation of the Act and at the same time be acting in good faith.

- e. The rate of penalty reduction for size of business, employer's good faith and employer's history of previous violations shall be calculated on the basis of the criteria described in the following paragraphs:

(1) Size.

A maximum penalty reduction of **50-percent** is permitted for small businesses. "Size of business" shall be measured on the basis of the maximum number of employees of an employer at all workplaces at any one time during the previous 12 months. Information on the total number of an employer's employees can generally be obtained at the inspected work site. However, on occasion it may be necessary to obtain or confirm the information from the employer's headquarters.

(a) The rates of reduction to be applied are as follows:

EMPLOYEES	PERCENT REDUCTION
1 – 25	50
26 – 100	30
101 – 250	10
251+	0 (None)

(b) An employer's ability to pay a penalty shall not normally be investigated or considered in determining the penalty reduction for size of business.

(c) However, if an employer presents convincing evidence at an informal conference of inability to pay a penalty because of financial difficulties, the Director may determine that a penalty reduction is appropriate. Such a determination shall be documented in the case file.

(d) When a small business has one or more serious violations of high gravity or a number of serious violations of moderate gravity, indicating a lack of concern for employee safety and health, the Director may determine that only a partial reduction in penalty shall be permitted for size of business.

(2) Good Faith.

A penalty reduction of up to **25-percent** is permitted in recognition of an employer's "good faith."

EXCEPTION: If one willful violation is found, no reduction for good faith can be applied to any of the violations found during the same inspection. An employer cannot be willfully in violation of the Law and at the same time, be acting in "good faith".

(a) A reduction of **25-percent** shall normally be given if the

employer has a written safety and health program (as documented during the inspection) that has been effectively implemented in the workplace and also:

- 1 Provides for appropriate management commitment and employee involvement, work site analysis for the purpose of hazard identification, hazard prevention and control measures, and safety and health training.

NOTE: One example of a framework for such a program is given in OSHA's voluntary "Safety and Health Program Management Guidelines" (Federal Register, Vol. 54, No. 16, January 26, 1989, pp. 3904-3916, or later revisions as published).

- 2 Includes all programs required under KY OSH standards applicable to the workplace (e.g., hazard communication, lockout/tag out, hazardous materials and emergency response, safety and health programs for construction (29 CFR 1926.20) and trenching and excavation).

- 3 Has deficiencies that are only incidental.

- (b) A reduction of **15-percent** shall normally be given if the employer has a documentable and effective safety and health program, but with more than only incidental deficiencies. For example, an acceptable program will be documentable by such means as minutes of employee safety and health meetings, employee training sessions, or other evidences of implemented programs applicable to the workplace.
- (c) No reduction shall be given to an employer who has no safety and health program or where a willful violation is found.
- (d) Only these percentages (15% or 25%) may be used to reduce penalties due to the employer's good faith. No intermediate percentages shall be used.

(3) History.

- (a) A reduction of ten (10)-percent shall be given to employers who have been inspected but not cited by KYOSH for any serious, willful, or repeated violations or failure-to-abate penalties that have become final orders of the Review

Commission within the **past five (5) years.**

NOTE: KY OSH will not issue violations with penalties that are greater than the statutory maximum.

- (b) A penalty increase of 10 percent shall be given to employers who have been inspected and cited by KY OSH for any serious, willful, repeat or failure to abate violations that have become final orders of the Review Commission within the **past five (5) years.**
- (c) No penalty reduction or increase if an employer has not had any inspections in **the past five (5) years.**
- (4) Total.
The total reduction will normally be the sum of the reductions for each adjustment factor.

EXAMPLE: An employer has a GBP of \$5000. It gets a 30% reduction for size and 25% reduction for good faith but gets 10% added to the reductions. Calculate penalty reduction factors as $30\% + 25\% - 10\% = 45\%$ penalty reduction.

EXAMPLE: An employer has a GBP of \$5000. It gets a 30% reduction for size and 25% reduction for good faith and 10% reduction for history. Calculate penalty reduction factors as $30\% + 25\% + 10\% = 65\%$ penalty reduction.

11. Imminent Danger Situations.

Detailed instructions and procedures for handling allegations of imminent danger situations are contained in Chapter VII. Penalties shall be assessed in accordance with the following:

- a. Classification.

An imminent danger situation normally will involve a serious, willful or repeated violation.

- b. Proposed Penalties.

Penalties shall be proposed in cases where citations are issued in imminent danger situations even though, after being informed by the CSHO, the employer immediately eliminates the imminence of the danger and initiates steps to abate the hazard. The procedures given in this chapter for

calculating and assessing proposed penalties shall be applied in the case of imminent danger situations as appropriate.

12. Effect on Penalties If Employer Immediately Corrects or Initiates Corrective Action.

Appropriate penalties will be proposed with respect to an alleged violation even though, after being informed of such alleged violation by the CSHO, the employer immediately corrects or initiates steps to correct the hazard.

13. Failure to Abate.

A notification of Failure to Abate an Alleged Violation (KY OSH-2B) shall be issued in cases where violations have not been corrected as required.

a. Failure to Abate.

Failure to abate penalties shall be applied when an employer has not corrected a previously cited violation which had become a final order of the Commission.

EXCEPTION: When a high gravity serious hazard is cited with an abatement date less than 15 working days, a follow-up inspection may be scheduled after expiration of the abatement period, but still within the 15 day notice of contest period, provided that the employer has not actually filed such a notice. (See Chapter II, F.1.c.(5), Notice of Contest Not Filed and Chapter V.F.1, "Follow-up Inspections.")

b. Employer Contest.

If an employer contests one or more of the alleged violations, the period for abatement does not begin to run, as to those items contested, until the day following the entry of the final order by the Review Commission affirming the citation.

- (1) If the employer contests only the amount of the proposed penalty, the employer must correct the alleged violation within the prescribed abatement period.
- (2) If an employer contests an abatement date in good faith, a Failure to Abate Notice shall not be issued for the item contested until a final order affirming a date is entered, the new abatement period, if any, has been completed, and the employer has still failed to abate.

c. Calculation of Additional Penalties.

A GBP for unabated violations is to be calculated for failure to abate a serious or other-than-serious violation on the basis of the facts noted upon re-inspection. This recalculated GBP, however, shall not be less than that proposed for the item when originally cited, except as provided in B.13.e. "Good Faith Effect to Abate."

- (1) In those instances where no penalty was initially proposed, an appropriate penalty shall be determined after consulting with the Supervisor. In no case shall the penalty be less than \$2,000 per day.
- (2) Only the adjustment factor for size and the 10% increase for history based upon the circumstances noted during the re-inspection shall then be applied to arrive at the daily proposed penalty.
- (3) The daily proposed penalty shall be multiplied by the number of calendar days that the violation has continued unabated, except as provided below:
 - (a) The number of days unabated shall be counted from the day following the abatement date specified in the citation or the final order. It will include all calendar days between that date and the date of re-inspection, excluding the date of re-inspection.
 - (b) Normally the maximum total proposed penalty for failure to abate a particular violation shall not exceed 30 times the amount of the daily proposed penalty.
 - (c) At the discretion of the Director, a lesser penalty may be proposed with the reasons for doing so (e.g., achievement of an appropriate deterrent effect) documented in the case file.
 - (d) If a penalty in excess of the normal maximum amount of 30 times the amount of the daily proposed penalty is deemed appropriate by the General Counsel and Secretary, the case shall be treated under the violation-by-violation penalty procedures established in OSHA Instruction CPL 02-00-080 Handling of Cases To Be Proposed for Violation-By-Violation Penalties 10/21/1990, (Formerly CPL 2.80).
- (4) In unusual circumstances, such as where the gravity of the violation is at the highest level (high severity and greater probability) or the employer has willfully failed to abate the violation or has failed to abate a second time, higher penalties shall be proposed. In such situations the proposed penalty shall be approved by the Secretary.

d. Partial Abatement.

When the citation has been partially abated, the Director may authorize a reduction of **25-percent** to **75-percent** of the amount of the proposed penalty calculated as outlined in B.13.c, "Calculation of Additional Penalties." The reasons for this action shall be documented in the case file.

- (1) When a violation consists of a number of instances and the follow-up inspection reveals that only some instances of the violation have been corrected, the additional daily proposed penalty shall take into consideration the extent that the violation has been abated.

EXAMPLE: Where three (3) out of five (5) instances have been corrected, the daily proposed penalty, calculated as outlined in B.13.c, "Calculation of Additional Penalties" without regard to any partial abatement, may be reduced by **60-percent**.

- (2) In multi-step correction items, only the failure to comply with substantive (rather than procedural) requirements shall generally incur a full failure to abate penalty.
- (3) On rare occasions, when the Director decides to issue a Failure to Abate Notice for failure to comply with procedural requirements, the calculation of the daily proposed penalty shall consider the extent to which a violation has been substantially abated, with the daily proposed penalty, calculated as outlined in B.13.c, "Calculation of Additional Penalties" without regard to any partial abatement, reduced accordingly.

e. Good Faith Effort to Abate.

When the CSHO believes and so documents in the case file that the employer has made good faith efforts to correct the violation and had good reason to believe that it was fully abated, the Director may reduce or eliminate the daily proposed penalty that would otherwise be justified.

14. Repeated Violations.

KRS Chapter 338.991(1) provides that an employer who repeatedly violates the law may be assessed a civil penalty of not more than \$70,000 for each violation.

a. Gravity-Based Penalty Factors.

Each violation shall be classified as serious or other-than-serious. A GBP shall then be calculated for repeated violations based on facts noted during

the current inspection. Only the adjustment factor for size and history, appropriate to the facts at the time of the re-inspection, shall be applied.

b. Penalty Increase Factors.

The amount of the increased penalty to be assessed for a repeated violation shall be determined by the size of the employer.

(1) Smaller Employers.

For employers with 250 or fewer employees, the GBP shall be **doubled** for the first repeated violation and **quintupled** for the second repeated violation. If the Secretary determines that it is appropriate to achieve the necessary deterrent effect, the GBP may be multiplied by ten (10).

EXAMPLE: An employer with 100 employees was found in violation of a serious violation of 29 CFR 1910.1200(h)(1) during a 5/2/2010 inspection. The employer has been cited for the same standard twice before. The final order for the first serious violation was 12/12/1999. The final order for the second serious violation was 7/3/2006. The employer would receive a repeat serious violation with a penalty calculation factor of 2 since this is the first repeated violation.

EXAMPLE: An employer with 100 employees was found in violation of 29 CFR 1910.1200(h)(1) during a 5/2/2010 inspection. The employer has been cited for the same standard twice before. The final order for the first serious violation was 12/12/2005. The final order for the first repeat serious violation was 7/3/2006. The employer would receive a repeat serious violation with a penalty calculation factor of 5 since this is the second repeated violation.

(2) Larger Employers.

For employers with more than 250 employees, the GBP shall be multiplied by **five (5) for the first repeated violation** and multiplied by **ten (10) for the second repeated violation**.

EXAMPLE: An employer with 300 employees was found in violation of 29 CFR 1910.1200(h)(1) during a 5/2/2010 inspection. The employer has been cited for the same standard twice before. The final order for the first serious violation was 12/12/1999. The final order for the second serious violation was 7/3/2006. The employer would receive a repeat serious violation with a penalty calculation factor of 5 since this is the first repeated violation.

EXAMPLE: An employer with 300 employees was found in violation of 29 CFR 1910.1200(h)(1) during a 5/2/2010 inspection. The

employer has been cited for the same standard twice before. The final order for the first serious violation was 12/12/2005. The final order for the first repeat serious violation was 7/3/2006. The employer would receive a repeat serious violation with a penalty calculation factor of 10 since this is the second repeated violation.

c. Other-Than-Serious, No Initial Penalty.

For a repeated other-than-serious violation that otherwise would have no initial penalty, a GBP penalty of \$500 shall be assessed for the first repeated violation, \$1000 if the violation has been cited twice before, and \$2000 for a third repeat.

NOTE: This penalty will not have the penalty increase factors applied as discussed under B.14.b.

d. Regulatory Violations.

For repeated violations of regulatory violations (see B.16.), the **initial penalty shall be doubled for the first repeated violation and quintupled for the second repeated violation.** If the Director determines that it is appropriate to **achieve the necessary deterrent effect, the initial penalty may be multiplied by ten (10).**

NOTE: See Chapter IV, B.5 for additional guidance on citing repeated violations.

15. Willful Violations.

KRS Chapter 338.991(1) provides that an employer who willfully violates the Law may be assessed a civil penalty of not more than \$70,000 but not less than \$5,000 for each violation.

a. Gravity-Based Penalty Factors.

Each willful violation shall be classified as serious or other-than-serious. After determining the gravity of the violation, a GBP shall be determined based on the facts noted during the inspection. The adjustment factors for size and history shall be applied.

(1) Serious Violations.

For willful serious violations, the **adjusted GBP shall be multiplied by ten (10).**

(a) In no case shall the proposed penalty be less than \$5,000.

(b) The Secretary may assess a higher penalty (up to the statutory maximum of \$70,000) or a lower penalty than that calculated in

accordance with B.15.a.(1), upon consideration of such factors as the degree of willfulness involved in the violation and the achievement of an appropriate deterrent effect. The reasons for such action shall be documented in the case file.

(2) Other-Than-Serious Violations.

For willful other-than-serious violations, the minimum willful penalty of \$5,000 shall be assessed.

b. Regulatory Violations.

In the case of regulatory violations (see B.16.) that are determined to be willful, the unadjusted initial penalty shall be multiplied by **ten (10)**. In no event shall the penalty, after adjustment for size and history, be less than \$5,000.

16. **Violation of 29 CFR 1904, 803 KAR 2:060, 803 KAR 2:125 and 803 KAR 2:180 Regulatory Requirements.**

Except as provided in the Appropriation Act, an employer who violates any of the **posting requirements** shall be assessed a civil penalty of up to \$7,000 for each violation **and may be assessed a like penalty for record keeping violations** per OSHA Instruction CPL 02-00-135 Recordkeeping Policies and Procedures Manual. For egregious violations, an additional factor may be applied, as described at B.9.d, "Egregious Cases," in accordance with the procedures set forth in OSHA Instruction CPL 02-00-080, Handling of Cases To Be Proposed for Violation-By-Violation Penalties, 10/21/1990 (Formerly CPL 2.80.)

a. General Application.

The procedures that follow shall be used in determining proposed penalties for violations of regulatory requirements only when the employer has received a copy of the OSHA-300 Form from any source or has knowledge of the requirements.

(1) If the employer has not received the OSHA-300 Form and does not have knowledge, citations without proposed penalties will be issued.

(2) All proposed penalties for regulatory violations shall have the adjustment factors for size, good faith and history applied.

b. Posting Requirements.

Penalties for violations of posting requirements shall be proposed as follows:

(1) OSHA Notice.

If the employer has not displayed (posted) the notice furnished by the Kentucky Occupational Safety and Health Program as prescribed in 803 KAR 2:060, an other-than-serious citation shall normally be issued. The unadjusted penalty for this alleged violation shall be \$1,000.

(2) Annual Summary.

If an employer fails to post the summary portion of the KY OSH-300 Form during the months of February through April as required by 29 CFR 1904, and /or fails to complete the summary prior to February 1, even if there have been no injuries, an other-than-serious citation shall be issued with an unadjusted penalty of \$1,000.

(3) Citation.

If an employer received a citation that has not been posted as prescribed in 803 KAR 2:125, an other-than-serious citation shall normally be issued. The unadjusted penalty shall be \$100.

c. Reporting and Record Keeping Requirements.

The procedures that follow shall be used in determining proposed penalties for violations of regulatory requirements only when the employer has received a copy of the KY OSH-300 Form through the Record Keeping Requirements booklet or from any other source, or has knowledge of the requirements.

Violations of the record keeping and reporting requirements may be assessed civil penalties of up to \$7,000 for each violation.

(1) OSHA-300 Form.

If the employer does not maintain the Log and Summary of Occupational Injuries and Illnesses, OSHA-300 Form, as prescribed in 29 CFR 1904, an other-than-serious citation shall be issued. There shall be an unadjusted penalty of \$1000 for each year the form was not maintained.

- (a) When no recordable injuries or illnesses have occurred at a workplace during the current calendar year, the OSH-300 need not be completed until the end of the calendar year for certification of the summary.
- (b) A OSHA-300 with significant deficiencies shall be considered as not maintained. (e.g. 300s not totaled, certified, incomplete entries, missing entries, entries recorded late, etc.)

(2) OSHA-301 Forms or IA-1.

If the employer does not maintain the Supplementary Record, OSHA-301 Form (or equivalent), as prescribed in 29 CFR 1904, an other-than-serious citation shall be issued. There shall be an unadjusted penalty of \$1000 for each OSHA-301 or IA-1 Form not maintained.

- (a) A penalty of \$1000 for each OSHA-301 or IA-1 Form not maintained up to a maximum of \$7000.
- (b) A penalty of \$1000 for each KY OSH-301 or IA-1 Form inaccurately maintained up to maximum of \$7000.
- (c) Minor inaccuracies shall be cited, but with no penalties.
- (d) If large numbers of violations or other circumstances indicate the violations are willful, then other penalties including violation-by-violation may be applied.

(3) Reporting Fatalities and Catastrophes

Employers are required to report orally to the Division of OSH Compliance within 8 hours, any occurrence of an employment accident which is fatal to one or more employees or which results in the hospitalization of three (3) or more employees.

- (a) An other-than-serious citation shall be issued for failure to report such an occurrence. The minimum unadjusted penalty shall be \$5000.
- (b) If the Director determines that it is appropriate to achieve the necessary deterrent effect, an unadjusted penalty of \$7000 may be assessed.
- (c) If the Director becomes aware of an incident required to be reported under 803 KAR 2:180 through some means other than an employer report, prior to the elapse of the 8 hour reporting period **and** an inspection of the incident is made, no failure to report violation shall be issued.

(4) Reporting Hospitalizations and Amputations

Employers are required to report orally to the office within 72 hours, any occurrence of an employment accident which results in an amputation or which results in the hospitalization of two (2) or fewer employees.

- (a) An other-than-serious citation shall be issued for failure to report such an occurrence. The minimum unadjusted penalty shall be \$5000.
 - (b) If the Director determines that it is appropriate to achieve the necessary deterrent effect, an unadjusted penalty of \$7000 may be assessed.
 - (c) If the Director becomes aware of an incident required to be reported under 803 KAR 2:180 through some means other than an employer report, prior to the elapse of the 72 hour reporting period and an inspection of the incident is made, no failure to report violation shall be issued.
- (5) Reporting Mechanical Power Press Point of Operation Injuries
An employer who fails to report a point of operation injury on a mechanical power press shall be assessed a penalty of \$5000.00
- d. Grouping.
Violations of the posting and record keeping requirements which involve the same document (e.g., summary portion of the OSHA-300 Form was neither posted nor maintained) shall be grouped as an other-than-serious violation for penalty purposes. The unadjusted penalty for the grouped violations would then take on the highest dollar value of the individual items, which will normally be \$1000.
- e. Access to Records.
 - (1) 29 CFR 1904

If the employer fails upon request to provide records required in 29 CFR 1904 for inspection and copying by any employee, former employee, or authorized representative of employees, a citation for violation of 29 CFR 1904 shall normally be issued. The unadjusted penalty shall be \$1000 for each form not made available.
 - (a) Thus, if the OSHA-300 for the three (3) preceding years is not made available, the unadjusted penalty would be \$3000.
 - (b) If the employer is to be cited for failure to maintain these records, no citation of 29 CFR 1904 shall be issued.

(2) 29 CFR 1910.1020.

If the employer is cited for failing to provide records as required under 29 CFR 1910.1020 for inspection and copying by any employee, former employee, or authorized representative of employees, an unadjusted penalty of \$1000 shall be proposed for each record, i.e., either medical record or exposure record, on an individual employee basis. A maximum \$7000 may be assessed for such violations. This policy does not preclude the use of violation-by-violation penalties where appropriate. (See OSHA Instruction CPL 02-00-080, Handling of Cases To Be Proposed for Violation-By-Violation Penalties, 10/21/1990, (Formerly CPL 2.80.)

EXAMPLE: If all the necessary evidence is established where an authorized employee representative requested exposure and medical records for three (3) employees and the request was denied by the employer, a citation would be issued for six(6) instances of violation of 29 CFR 1910.1020, with and unadjusted penalty of \$7000.

f. Notification Requirements.

When an employer has received advanced notice of an inspection and fails to notify the authorized employee representative as required by 803 KAR 2:080, an other-than-serious citation shall be issued with an unadjusted penalty of \$2000.

C. Criminal Penalties.

The Director, who, in consultation with the General Counsel and with approval of the Secretary, shall refer cases for possible criminal prosecution to the Kentucky Attorney General.

D. Handling Monies Received from Employers.

Reserved.

TABLE VI-1
 PENALTY TABLE

PERCENT REDUCTION	PENALTY (IN DOLLARS)						
0	1000	2000	3000	4000	5000	6000	7000
10	900	1800	2700	3600	4500	5400	6300
15	850	1700	2550	3400	4250	5100	*5950
20	800	1600	2400	3200	4000	4800	5600
25	750	1500	2250	3000	3750	4500	*5250
30	700	1400	2100	2800	3500	4200	4900
35	650	1300	1950	2600	3250	3900	*4550
40	600	1200	1800	2400	3000	3600	4200
45	550	1100	1650	2200	3750	3300	*3850
50	500	1000	1500	2000	2500	3000	3500
55	500**	900	1350	1800	2250	2700	*3150
60	400**	800	1200	1600	2000	2400	2800
65	500**	700	1050	1400	1750	2100	*2450
70	500**	600	900	1200	1500	1800	2100
75	500**	500	750	1000	1250	1500	*1750
85	500**	500**	500**	600	750	900	*1050

* Starred figures represent penalty amounts that would not normally be proposed for high gravity serious violations because no adjustment for good faith is made in such cases. They may occasionally be applicable for other-than-serious violations where the Secretary has determined that a high unadjusted penalty amount to be warranted.

**Administratively, KYOSH will not issue a penalty less than \$500.00 for a serious violation.